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No. 91-1551

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS MOSES AYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's motions to suppress evidence obtained from a state-authorized wiretap were properly denied as untimely.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not reported, but the judgment is noted at 949 F.2d 1162 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1991. A petition for rehearing was denied on December 30, 1991. Pet. App. 2a. The petition for a writ of certiorari was filed on March 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of conspiracy to operate a gambling business and to evade the federal wagering excise tax, in violation of 18 U.S.C. 371; one count of conducting an illegal gambling business, in violation of 18 U.S.C. 1955; and two counts of failing to file a wagering occupational tax return, in violation of 26 U.S.C. 7201 and 7203. He was sentenced to 75 months' imprisonment and a $75,000 fine. The court of appeals affirmed by judgment order. Pet. App. 1a.

1. In 1987, law enforcement authorities received information that petitioner and co-defendants Lester Ellenburg and Richard Pierce were involved in the operation of a large-scale gambling organization in Georgia. After an investigation that made use of a confidential informant, it was determined that the organization was operating from 2782B Country Court in Conyers, Georgia, and from 829 and 835 Briar Creek Court in Conyers, Georgia. Law enforcement officers then applied for and received authority to install pen registers on two telephones at 2782B Country Court and on two telephones at 835 Briar Creek Court. An analysis of the pen register tapes at both locations revealed that the telephones were apparently being used to conduct gambling activity. As a result of the analysis of the pen register tapes, state authorities applied for the issuance of a wiretap. Gov't C.A. Br. 4-6.

On November 21, 1987, state-authorized wiretaps were placed on two telephones located at 2782B Country Court and on two telephones located at 835 Briar Creek Court. The wiretaps were monitored by state law enforcement officers and revealed that both locations were being used to conduct illegal gambling

activity. Gamblers would call those telephones and identify themselves by a code name or code number to place a wager. After a gambler called and identified himself, the gambler was advised whether he had won money previously or whether he owed money to the gambling operation. The wiretaps also revealed that 829 Briar Creek was being used as a lookout post to detect whether law enforcement officers were conducting surveillance. Gov't C.A. Br. 6.

Based upon these facts, law enforcement officers obtained warrants to search the three premises and two automobiles. When the officers executed the warrants, they discovered records containing the names, addresses, code names, and numbers of gamblers. The wiretaps and the seized records revealed that the 835 Briar Creek location accepted $4,710,967.50 in wagers during an eleven-month period on professional football alone, and that the federal two percent tax owed on that amount was $81,439.35. Petitioner, Ellenburg, and Pierce all failed to file the required tax return or pay taxes for that time period, and they failed to file the required returns or pay the $500 yearly tax for the periods July 1, 1986, to June 30, 1987, and July 1, 1987, to June 30, 1988. Gov't C.A. Br. 8.

2. Petitioner was indicted on the instant charges on September 20, 1989, and was arraigned the next day. Local rules require that all pretrial motions be filed ten days after arraignment. Despite that requirement, petitioner did not file motions until October 16, or 25 days after arraignment. In those motions, petitioner sought to suppress the fruits of a 1984 wiretap. The government did not oppose that motion. Pet. C.A. Br. 15. Petitioner's trial began on July 25, 1990; six days before commencement of trial, petitioner filed what he captioned an "addendum" to his motion to suppress, claiming that the recordings

from the 1987 wiretaps had not been sealed as required by 18 U.S.C. 2518(8)(a). Gov't C.A. Br. 12-13. The district court denied the motion as untimely. During trial, petitioner raised for the first time other claims about the wiretap, including that the state authorization was a sham to avoid federal statutory requirements, and that he had never been given notice of the wiretap. Gov't C.A. Br. 15, 17. The district court likewise denied those motions, and the court of appeals summarily affirmed. Pet. App. 1a.

ARGUMENT

1. Petitioner's motions to suppress the wiretap evidence were not timely filed in the district court, and the court accordingly acted properly in denying them. Fed. R. Crim. P. 12(b)(3) requires that all motions to suppress evidence be filed prior to trial. The same requirement is contained in 18 U.S.C. 2518 (10)(a) concerning motions to suppress electronic surveillance evidence. Rule 12(c), Fed. R. Crim. P., further provides that a trial court may set a deadline for the filing of pretrial motions, and Rule 12(f) states that a party's failure to file motions within the time set by the court constitutes a waiver of the claim. The district court below has implemented Rule 12 and Section 2518(10) by local rule that requires that all pretrial motions be filed within ten days of arraignment.

Petitioner did not comply with the ten-day rule. Indeed, he concedes (Pet. 6) that "[a]bout a week before * * * trial was scheduled to begin, he filed a motion to suppress in which he sought a hearing." That motion was filed more than eight months after his arraignment. Moreover, even that motion did not include either his claim that the state-authorized wiretaps were a sham to avoid the need to obtain

authorization from the Attorney General or his claim that the fruits of the wiretap could not be used because the government did not obtain court authorization for the use of the state wiretaps; petitioner first presented those claims during trial. Petitioner does not offer any reason for his failure to file his motion in a timely manner. Therefore, the courts below properly denied his claims as untimely. See *United States* v. *Milian-Rodriguez*, 828 F.2d 679, 683 (11th Cir. 1987), cert. denied, 486 U.S. 1054 (1988); see also *United States* v. *Crismon*, 905 F.2d 966, 969 (6th Cir. 1990).

2. In any event, petitioner cannot succeed on the merits of his contentions.

First, the district court, after reviewing the records of the state wiretap, concluded that it appeared that the tapes had been properly sealed. Gov't C.A. Br. 14. Petitioner does not offer any reason to believe that the district court's conclusion on that issue was incorrect.

Second, petitioner has offered no facts in support of his allegation that the state investigation was merely a sham to avoid the requirement of 18 U.S.C. 2516(1) that the Attorney General or other senior Justice Department official authorize federal wiretap applications. The wiretap statute specifically allows the principal prosecuting attorney of a state political subdivision to apply under state law for a wiretap seeking evidence, *inter alia*, of gambling. See 18 U.S.C. 2516(2). The record shows that the local district attorney applied for the two wiretaps under pertinent provisions of Georgia law, and that the wiretap orders were issued by a judge of competent jurisdiction. Moreover, the wiretaps sought evidence of gambling. Gov't C.A. Br. 19. The fact that the federal government ultimately prosecuted petitioner,

while the State did not, is insufficient to demonstrate that the wiretap was not sought in aid of the State's own investigation of petitioner's gambling operation.

Petitioner asserts that the decision below conflicts with *United States* v. *Giordano*, 416 U.S. 505 (1974). In *Giordano*, this Court held that the Executive Assistant to the Attorney General could not authorize an application for a federal wiretap, because Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. *Id.* at 508. *Giordano* obviously does not apply here, however, because the wiretap was sought and authorized by Georgia state officials under Georgia law. Nothing in *Giordano* precludes such actions under state law; indeed, Section 2516(2) specifically sanctions such procedures.

Third, petitioner erroneously claims that the fruits of the wiretap should have been suppressed because he did not receive notice of the wiretap under 18 U.S.C. 2518(8)(d). Section 2518(8)(d) provides that, after termination of the surveillance, notice must be given to persons named in the wiretap application. Petitioner was not named in the state wiretap order. See Gov't C.A. Br. 15. Therefore, the statute did not require that he receive notice.

Petitioner states that the admission of the wiretap evidence was nonetheless contrary to *United States* v. *Donovan*, 429 U.S. 413 (1977). In *Donovan*, this Court held that when the government seeks an extension of a wiretap authorization, the government must furnish the court either with the names of those persons overheard during the initial wiretap or with a description of the general class or classes of those persons, so that the authorizing judge may decide

whether to furnish those persons with statutory notice of the surveillance. Significantly, the Court did not require that notice be sent to persons not named in the authorization. Moreover, the Court held that the statute did not require the suppression of evidence due to the failure of the government to furnish the court with the identities of the persons or classes of persons whose conversations were intercepted. The Court said that "[n]othing in the structure of the act or [its] legislative history suggests that incriminating conversations are 'unlawfully intercepted' whenever parties to those conversations do not receive discretionary inventory notice." *Id.* at 438. Hence, petitioner's claim is meritless.

Finally, petitioner asserts that, contrary to 18 U.S.C. 2517(5), the federal prosecutor did not obtain prior judicial approval to use the state wiretap evidence in his federal prosecution. Section 2517(5) requires that when the intercepted material relates to "offenses other than those specified in the order of authorization," a judge must approve the use of such evidence. Contrary to petitioner's apparent assertion, the state and federal gambling offenses here were not different enough to qualify as "other" offenses within the meaning of Section 2517(5). See *United States* v. *Watchmaker*, 761 F.2d 1459, 1470 (11th Cir. 1985) (wiretaps obtained in investigation of drug offenses could be used in RICO prosecution because of close relationship between the two; the drug crimes were alleged as predicate acts), cert. denied, 474 U.S. 1100 (1986).

Neither *United States* v. *Brodson*, 528 F.2d 214 (7th Cir. 1975), nor *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), is to the contrary. *Brodson* involved a federal wiretap for evidence of conducting a gambling business under 18 U.S.C. 1955; the government later

introduced that evidence in a prosecution under 18 U.S.C. 1084 for transmission of wagering information. In *Marion*, the wiretap was authorized for the state crime of illegal possession of dangerous weapons, while the federal prosecution was for transportation of unregistered firearms in interstate commerce. In both *Brodson* and *Marion*, the offense for which the wiretap was sought and the offense for which the fruits of the wiretap were used involved "dissimilar elements and require[d] different evidence." *Brodson*, 528 F.2d at 216; see *Marion*, 535 F.2d at 703-704 & n.13. Accordingly, Section 2517(5) required the government to obtain prior approval to use the wiretap evidence in the unrelated prosecution. Here, by contrast, the state and federal gambling charges were parallel crimes that could be proved by the same evidence. Accordingly, even if petitioner had raised his challenges in a timely manner, *Brodson* and *Marion* would not provide support for his argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY

BRIEF

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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(1)

Was the motion to suppress timely filed?

To be sure, all motions to suppress should be filed well in advance of trial. And, had Ayers been served with the requisite post-tap notice,[1] there is no question but that

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[1] 18 U.S.C. § 2518(8)(d) in pertinent part provides:

Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under Section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

he would have filed one promptly. He's not shy. Alas, he was *never* served with such notice.

When, shortly before trial, he discovered that the Goverment intended to use the fruit of the tap, notwithstanding that he had not been served with the requisite inventory notice, he shifted into high gear.

Ayers argued to the Court of Appeals (Appellant's C.A. Br. 15-23) that it is the inventory notice which alerts an intercepted party to the need of filing a motion to suppress. It tells him (a) that his conversations have been intercepted and (b) that the interceptions may be used against him. Until that happens, it's questionable whether he has standing and, pretermitting standing, unless and until the authorities signify their intent to use the fruit of the tap against him, the issue is academic.

In any case, the legislative history provides "reasons" (Br. in Opp. 5) excusing late filing:

> "The motion must be made before the trial . . . unless there was not opportunity to make the motion or the person was not aware of the grounds of the motion, for example, when no notice was given" to a person entitled thereto. 1968 U.S. Code Cong. and Adm. News 2195.

Respondent does not challenge Petitioner's claim that he received no post-tap notice as required by section 2518 (8) (d).

And Respondent concedes that such "notice *must* be given to persons named in the wiretap *application*." Br. in Opp. at 6. (Emphasis added.)

But, Respondent argues, since "Petitioner was not named in the state wiretap *order*," the statute does not

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(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

require that Petitioner be served with notice. Br. in Opp. at 6. (Emphasis added.)

That statement, if not the Mother of all Non Sequiturs, is certainly Dandiest Non Sequitur of the Year.

This discordant note aside, Respondent's argument fails for a number of reasons.

First, it is flat contrary to the language and structure of Title III and its legislative history. For example, Title III requires that inventory notice be served upon "the persons named in the order *or* the application." 18 U.S.C. § 2518 (8) (d) (emphasis added).

Senator Hart of the Judiciary Committee explained its purpose:

> "The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute." 114 Cong. Rec. 14485-14486 (1968).
>
> "[T]he version of Title III that emerged from the Senate Judiciary Committee provided "for mandatory notice" to the "persons named in the order *or the application.*" *United States v. Donovan*, 429 U.S. 413, 438 (1977) (emphasis added).

Second, even if, as the United States argued in *Donovan*, that notice need only be served on the "principal target," *Donovan*, 429 U.S. at 422, Ellis Moses Ayers *was* the principal target. An analysis of the wiretap application shows:

> One Richard M. Pierce, aka "Tennessee," is booking at the target phones; Pierce is "at least affiliated with Ellis Ayers. Ayers is a well known figure in sports bookmaking in metro Atlanta and has recently been released from prison after serving a short term for commercial gambling." Pierce and Ayers meet at Pierce's home every Monday; the affiant saw Ayer's car at Pierce's home on Monday, December 22nd; on Monday December 29th two Special Agents saw Ayers arrive at Pierce's home, remove "papers,

i.e., gambling records from the trunk of his car and enter Pierce's home, departing 15 minutes later with a "notebook" which he stuck in the trunk of his car. The affiant "was prepared to issue [sic] a search warrant for Ellis Ayers [sic] 1984 Mercedes Benz, however, it could not be located . . . ."

Finally, although surveillance of Pierce shows him meeting with Ayers, "there is no hard evidence" connecting Ayers with Pierce's operation. Therefore, "in order to overhear, intercept, and record the conversations of" Ayers, wiretap authorization is needed.

And, while the Order of Authorization did not specifically name Ayers, it did incorporate his identity by reference:

(a) there is probable cause for belief that the *individuals named in the Petition* have committed and are committing said offenses.

. . .

(d) there is probable cause for belief that the facilities from which the wire or oral communications are to be intercepted have been used and are being used in connection with the commission of said offenses, are listed in the name of or commonly used by the *individuals named is the petition* . . . .

(Application and Affidavit for Search Warrant, Record Excerpt 9, Appellant's Brief, 11th Circuit.)

(2)

In any case, even if the motion to suppress was not timely, we respectfully suggest that the decision below should be reversed because the objections to use of the tapes, at trial, not only were timely, they were invincible.

Notwithstanding the Government's assertion in its brief to the Court of Appeals, the district court did not find that the "tapes had been properly sealed." Br. in Opp. 5. Respondent's reliance on the Government's Brief to the Court of Appeals is misplaced.

To be sure, the Government asserted in its Brief to the Court of Appeals that "the trial court judge, upon reviewing the documentation pertaining to the state wiretap concluded that it appeared that the tapes were sealed. (R7-38.)"

We have carefully reviewed every inch of the record. The Government's claim is unsupported by the record. The trial judge, after embarking, *sua sponte*, on a review of the "documentation pertaining to the state wiretap," had this to say:

> "And I do not have—it is correct we do not have in our file anything that says I hereby seal these tapes. But it *could be* that Judge Vaughn acknowledged that the tapes were being turned over to him that his clerk, in fact, fastened up the box and put something on it that would constitute a seal for Title III purposes." (Volume 8, Trial Transcript 37; R 13-37 Cited as R 7-38 by the Government.)

Shortly thereafter the trial judge went on to say:

> "I mean, your point is there is nothing in the record that evidences that the tapes were sealed, *and you are right about that*, I guess, unless you can infer it from the return that was signed by the Rockdale County judge, which I guess maybe you can." (R 13-40.)

Pretermitting whether these idle and vague ruminations were the functional equivalent of a "finding" that the tapes were sealed by the state judge, the trial record belies any such conclusion. It is incontestable that none—not one—of the tapes played at the trial bore any seal. And Ayers, from the very beginning and throughout the trial, with tiresome regularity, repeatedly objected to the playing of the tapes because of the absence of the seal provided for by 18 U.S.C. § 2518(8)(a), or any explanation for its absence:

> MR. SHAFER: Do I understand you are going to let the tapes in, or not?

THE COURT: I'm going to defer ruling on them. (R 7-29.)

MR. SHAFER: I do not see a judicial seal on here. So, in the absence of a seal, I object to any testimony regarding that exhibit. (R 7-167.)

THE COURT: Any other objections?

MR. SHAFER: 2518(8)(A). (R 7-168.)

Ayers moved, and the trial court granted, a continuing objection to all 55 tapes on the grounds advanced, i.e., the absence of a seal.

MR. SHAFER: Excuse me, sir. May I have a continuing objection?

THE COURT: The same as the last objection on — Government's 49?

MR. SHAFER: Exactly.

THE COURT: Yes, you may.

MR. SHAFER: And as to each and every one of these?

THE COURT: When you say these, the stack here is going to go through what, 51?

MR. SCHROEDER: 55.

THE COURT: Okay. You may have that same continuing objection through and including Government's Exhibit 55.

MR. SHAFER: Thank you, Your Honor. (R 7-169.)

MR. SCHROEDER: . . . At this time the Government would move to introduce into evidence government's Exhibits 50 through 55.

MR. SHAFER: Objection. (R 7-173.)

MR. SHAFER: Same objection, if the Court please.

THE COURT: Same ruling. You may proceed. . . . (R 7-180.)

MR. SHAFER: I object to the playing of this tape on the following grounds: No showing has been made that these tapes are faithful reproductions of the original tape.

Number two, these tapes are not the best evidence.

Number three, there is an obvious absence of a judicial seal. (R 8-10.)

MR. SCHROEDER: Okay, thank you. Your Honor, at this time the government would move to play Government's Exhibit 52 previously introduced into evidence.

MR. SHAFER: Same objection, if the Court please. (R 8-11.)

MR. SCHROEDER: Your Honor, at this time the government would move to play Government's Exhibit 53 previously introduced into evidence.

. . .

MR. SHAFER: Same objections, if the Court please. (R 8-12.)

MR. SHAFER: Objection, all of this is fruit of violation of 2518(8)(a) and 2517(5). (R 9-112.)

MR. SHAFER: May I have a continuing objection to this so I don't keep interrupting?

THE COURT: You may. (R 9-118.)

MR. SHAFER: As an additional basis for the evidence which I'm trying to adduce is that the government has failed to comply with 2518, subdivision (d), and to this date we have not been served with the requisite notice. (R 10-89.)

THE COURT: I understand that, but shift gears for just a minute. You are now saying with respect to the instant motion to strike, you are talking about the fruits of the state wiretap. You had earlier made a motion to suppress based on Title III. What is it you are claiming should have been sealed pursuant to Title III that wasn't?

MR. SHAFER: Those lovely conversations that they played in this courtroom which the jury heard which were not sealed, and the presence of that seal is a prerequisite the Congress said, a prerequisite, and it ain't there.

THE COURT: Well were those tape recordings a fruit of the state wiretap?

MR. SHAFER: Sure, they were. They were a fruit of the wiretap conducted against my client evidently in Rockdale County over those two telephones. Otherwise, you wouldn't let them in. I mean, you are not going to let in stuff that is not relevant against my client.

THE COURT: Well, there's a standing issue that hasn't been addressed, but I understand where you're coming from, okay?

MR. SHAFER: I'm sorry.

THE COURT: I suppose there is a standing issue that would have to be addressed.

MR. SHAFER: Standing? He's standing in the jailhouse. That's as far as he wants to stand. He doesn't need any more standing than that. The government says those are his conversations. That's all the standing he needs. He doesn't need any more standing than that. He doesn't have to be—he's the target if his conversations have been intercepted. So, in any case, it's enough. In any case, standing is not a question here. I don't think the government would seriously argue that.

What is a question is, (a) a hoax in Rockdale County, (b) the failure to seal, (c) the failure to go to a judge and ask permission to use this other evidence which was not embraced within the four corners of the initial wiretap authorization. That's my speech, and I'm through. (R 11- 11-13.)

MR. SHAFER: In addition to all of the grounds previously asserted, with respect to those tapes . . we object to those on the grounds of relevance. (R 11 -97.)

THE COURT: Mr. Shafer?

MR. SHAFER: We have already entered all of our objections. There is no need to guild (sic) the lilly. (R 11 -107.)

MR. SHAFER: Your Honor, at this time on the grounds that this is evidence derived from, it is objected to. (R 11-155.)

MR. SHAFER: Same objection as previously articulated, if the Court please. (R 11-162.)

MR. SHAFER: Your Honor, may I interpose an objection at this time and have a continuing objection to this entire inquiry on the grounds previously articulated; namely 2517(5) and 2518(8)(a), 2518(9), and 2518—bear with me one second, please. I said 2517(5), did I not, Your Honor?

THE COURT: I believe that you did.

MR. SHAFER: 2518(8)(a) and (b) and (d).

THE COURT: Yes, you may. (R 12 167.)

MR. SHAFER: May it please the Court, on behalf of Mr. Ayers, I respectfully move pursuant to Rule 29 for judgment of acquittal. I will not belabor the grounds upon which we rely. We have articulated them throughout the course of this trial ad nauseam. It is our position that the evidence in this case and the ensuing indictment violated Section 2517.(b) of Title 18.

The second basis for this motion is that all of the evidence is this case was derived from electronic surveillance, and the tapes of the intercepted conversations were not sealed in accordance with 2518 (8)(a) and (b). (R 13 - 3-4.)

MR. SHAFER: I object to . . . on the ground that they are fruits of the illegal electronic surveillance in this case. (R 13-51.)

The prosecutor stoutly maintained, before and during the trial, that presence of the seal was not required. At the pretrial conference the Assistant U.S. Attorney argued that absence of the seal "is no basis to suppress the wiretap. Mr. Shafer has not provided any case support for his proposition. So, even if what he said was true, it would be of no moment." (Transcript of Pretrial Conference 4; R 5-4.)

MR. SHAFER: I do not see a judicial seal on here. So, in the absence of a seal, I object to any testimony regarding that exhibit.

. . . .

MR. SCHROEDER: My response is it is not necessary that this have on it that there is a judicial seal. (R 7-167.)

Somewhat perplexing is the Government's total failure —here and in the Court of Appeals—to address the issue dealing with the absence at trial of the seal provided for by subsection 8(a) of 18 U.S.C. § 25-8.[2]

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[2] 18 U.S.C. § 2518(8)(a), in pertinent part, provides:

The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a

Far more perplexing is the Government's failure—here and in the Court of Appeals—even to mention *United States v. Rios*, 495 U.S. ——, 110 S. Ct. 1845, 109 L. Ed. 2d 224 (1990), which dealt with this very question, and which just happens to be controlling.

Unlike the district judge, we will not speculate why the Government defaulted.

(3)

Keeping in mind the requirement of this Court's Rule 21.1(g) that petitions for certiorari be "concise," we will reserve further argument on all other questions for the brief on the merits.

CONCLUSION

For these reasons, the petitioner, Ellis Moses Ayers, prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication or evidence derived therefrom . . . .